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No. 85-1147

IN THE

SUPREME COURT FOR THE UNITED STATES

January Term, 1986

RADIATION TECHNOLOGY, INC.

Petitioners,

V.

NEUTRON PRODUCTS, INC.

Respondent

REPLY TO BRIEF OF RESPONDENT"S OPPOSITION TO CERTIORARI

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TABLES OF CONTENTS

I: Reply to Respondent's statement regarding "hearing on both motions" on May 30, 1984 1

II: Reply to Respondent's statement that Petitioner did not seek a postponement of the Rule 11 Motion 3

III: Reply to Respondent's statement that the issue of due process was not raised before the District Court; Petitioner's May 21 brief on Rule 11 4

IV: Reply to Respondent's statement that the issue of due process was not raised before the District Court; portions of transcript of hearing on May 30, 1984. 8

V: Conclusion 13

REPLY TO BRIEF OF RESPONDENT'S OPPOSITION TO CERTIORARI

Pursuant to this Court's Rule 22.5, Petitioner Radiation Technology, Inc. ("Radiation") files this Reply to the Brief in Opposition filed by Respondent Neutron Products, Inc. ("Neutron"). This Reply will be limited to matter introduced by Respondent's Opposition.

I:

Neutron states (at page 6 of its Opposition) that:

> "The hearing on both these motions was held on May 30, 1984 before the District Court."

Neutron plainly implies that the May 30 hearing was understood by both parties and the Court to embrace both Respondent's Motion for Summary Judgment and Respondent's Rule 11 Motion for costs. That implication is wholly

false. An examination of Appendices, J, K and L (filed by Radiation with its Petition herein) indicates that Judge John Hargrove scheduled the May 30 hearing solely on Respondent's Motion for Summary Judgment (App. J, dated April 18, 1984). Thereafter Respondent, by letter to the Court dated May 9 sought to have both motion heard (App.K). But Petitioner opposed this joinder in a letter to the Court dated May 16, 1984. No further word from the Court was heard. When Counsel came to the courtroom in Baltimore on May 30, the only notice that the Court had given them was that the hearing on that day was on Respondent's motion for summary judgment and on that Motion alone. Petitioner simply was not on notice that Respondent's Rule 11 was to be heard on

May 30th.

II:

Neutron further states at page 6 of its Opposition, that:

> "Furthermore, at no time before the hearing did Radiation file a motion seeking to postpone it"

The letter of May 16, 1984 to the Court (Appendix L) ended:

> "But Plaintiff requests that the hearing on May 30 be restricted to the issue originally set by the Court for that date; to wit, the motion for summary judgment."

That motion was the only motion scheduled by the Court for that date.1/

1/ The six week time lag between notice and hearing of the Summary Judgment Motion (April 18 to May 30) clearly indicates that this separate hearing on the Rule 11 Motion (filed May 4) would be subsequent to the May 30th hearing.

Appendix L clearly requested a separate, subsequent hearing on Respondent's Rule 11 Motion.

III:

Neutron contradicts itself and the facts of what occurred on May 30, 1984 when it argues first:

> "Radiation filed a lengthy written memorandum in Opposition to Neutron's motion to recover its attorney's fees" (Respondent's Opposition at 12)

and then states in its final paragraph on page 16 that the:

> "Issue of due Process was not raised before the trial court." (Respondent's Opposition, 16)

What the Radiation brief (filed on May 21, 1984 and in the record before Judge Gray on May 30), did was to pinpoint the half dozen clear disputes of sworn 1/

1/ On Petitioner's Motion for Preliminary Injunction, disposed of 17 months before the hearing before Judge Gray on May 30, 1984.

fact that stood between the parties on the Rule 11 Motion. The magic words "due process" were not set forth in that brief because the events of May 30 were still nine days in the future. But any judge and any lawyer reading Petitioner's May 21 filing could not possibly read that submission without understanding with perfect clarity that a factual hearing was required to resolve the "half dozen clear issues of fact" outlined in the memorandum filed by Petitioner on May 21. Petitioner's memorandum was in the record before Judge Gray on May 30th.

Primary among those issues of fact was the question of whether Arkansas refused entry of Respondent's sources because under its licensing statute, it had determined that:

> "because of the existence of the micro-cracks, the State of Arkansas had" "determined that such cracks pose a radioactive threat unacceptable to it." (Respondent Opposition, at 10)

Either Arkansas did or did not take that position until april 2, 1982 1B/. The implication from Bevill's 1C/ affidavit is clearly that Dr. Welt volunteered reencapsulation without any requirement from Arkansas. To Judge Gray the factual dispute was clear; he held that Bevill told the truth and that Dr. Welt did not.

1B/ Dr. Welt's sworn testimony is that until April 2, 1982, Arkansas refused entry of Respondent's Cobalt, and his testimony further stated that on April 2 he undertook to reencapsulate the Cobalt within one year, relying on Respondent's promise to do so at no cost. Then, and only then, did Arkansas permit Respondent's Cobalt into the state (App. E-2)

1C/ Arkansas' health official.

Contrary to Respondent's statement (at page 13 of its opposition), Petitioner desired no "full trial" before Judge Gray issued his Rule 11 award. What it asked then and now was live testimony from the two witnesses whose sworn statements disputed each other.1D/ Live testimony obviously may not be required in all Rule 11 proceedings. But when sworn, conflicting written affidavits are the basis of the Rule 11 award (as in this case), there is no other way that a Court find the truth. In this case, due process dictated that Judge Gray hear and see Bevill and Dr. Welt before accepting Bevill's afffidavit, and branding Dr. Welt's as false.

1D/ On the major disputed issue of whether Arkansas refused entry of respondent's Cobalt without Petitioner's undertaking to reencapsulate; See footnote 1B, supra.

IV:

In dealing with whether the due process point was raised before the District Court, raised at page 16 of Respondent's Opposition, 1DD/ it is essential for the Court to understand the sequence of events that occurred on May 30th. This is best done by Reference to the transcript.

Early on in the hearing, Judge Gray stated:

> "Gentlemen, I wish I had time to study this entire record: (Appendix M, attached to this Reply)

At that point and until immediately prior to breaking of the hearing(to enable Judge Gray to read the record) Counsel for Plaintiff had no inkling whatever that what was going on in that courtroom went beyond the summary judgment motion scheduled for that day. Then at page 46 of an 85 page transcript, Judge Gray stated for the

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1DD/ Petition has already described its written memorandum of Opposition to the Rule 11 Motion, filed on May 21, 1984 which was on the record before Judge Gray on May 30, 1984, in which Petitioner delineated point by point the disputes of fact between the parties, supra, p 4-5.

first time: (see Appendix N, attached to this Reply):

> "The Court: Let me interrupt this. Gentlemen I am going to check the record. I am going to put this off. I am supposed to put this off until tomorrow morning but if I find that Defendants are right and that Arkansas did not refuse to accept this material, I am going to award attorney's fees" (Appendix N, page 46 of the Transcript of May 30, 1984)

That was the first surfacing of the unscheduled Rule 11 motion 1E/ more than half way through what had been an argument on summary judgment.

1E/ On the issue of Arkansas' refusal to admit Respondent's Cobalt, on which the sworn statements of Dr. Welt and Bernard Bevill (the Arkansas health official) were in dispute.

What follows on page 52 of the transcript reflects the prejudicially unfair situation into which Judge Gray's unexpected and unschedule foray plunged Petitioner. (The page is Appendix O to this Reply).

Counsel for Petitioner had consulted with Radiation's headquarters in Rockaway in a short break and found that Dr. Welt was out of the country. He was there because Petitioner had not been notified that the Rule 11 motion was to be heard in Baltimore on May 30. Nonetheless counsel stated:

> "Mr. Sharlitt:
> What we're asking for was a bit more time because I was unable to get a client of mine down here for this hearing. I asked and they could not come."

The total futility of any future hearing on the matter under the peculiar

circumstances of this case was then made clear by Judge Gray:

> "The Court:
>
> I am going home to Los Angeles tomorrow afternoon, and I have another matter on the calendar that I must take tomorrow morning; so I am going to make some time for this tomorrow morning."

In six pages of transcript, Judge Gray had (1) flatly determined that he was going to enter sanctions if he found that Arkansas had not refused Respondent's sources in--a fact bitterly opposed by the sworn testimony of Dr. Welt; (2) indicated that he was returning to Los Angeles the following day. The result of these pronouncements forced Petitioner's counsel to argue, as best he could, the split of fact between affiants on a paper record. The intervention of Rule 11 motion had come

as a total surprise; Judge Gray's determination to impose sanctions was fixed and unchangeable as any reading of the record makes clear; and there was no way that Petitioner could make Dr. Welt available in Baltimore within 24 hours--and no way to subpoena Neutron's affiants within those 24 hours.2/

In five pages at the close of the hearing (following the above) Judge Gray made his award. Again, the magic words "due process" were not mentioned, but Petitioner's counsel did make it clear (above at Tr. 52) to the Court that he wished testimony from Welt,

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2/ The impossible situation faced by Petitioner on May 30, 1984 would have been very different had the trial judge been Judge Hargrove or any other federal Judge in that District. Then, Petitioner could have asked for the additional time in order to present live testimony. But this was imposible in light of Judge Gray's manifest determination to enter sanctions and depart to the West Coast on the next day.

3/ which was impossible given Judge Gray's flat decision to award sanctions and his announced departure to the West Coast on the following day.4/

V: Conclusion

For the reason stated in Petitioner's Petition and in this Reply, the Writ of Certiorari should be issued by this Court.

Respectfully submitted,

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Dated: February , 1986

3/ As any reading of Petitioner's May 21 memorandum (in the record before Judge Gray on May 30) would have been made unmistakably clear.

4/ Appendix O (attached to this reply) contains Judge Gray's statement in the transcript of May 30, 1984 that he was awarding costs under Rule 11 based on Petitioner's Motion for Preliminary Injunction 17 months earlier and not on any averments or conduct that were before him on May 30, 1984.

THE COURT: What did the defendant say in response to the plaintiff's prodding?

MR. SHARLITT: Simply that they were having problems and also an attempt to try and get a waiver based on delivery of all of this amount by February 28th, which waiver was turned down.

THE COURT: Which waiver was --

MR. SHARLITT: By Welt. Welt said we need this stuff on December 15th.

THE COURT: You don't agree with Mr. Nichelson's assessment of the colloquy.

MR. SHARLITT: No, I don't, sir. no, I don't.

THE COURT: Gentlemen, I wish I had time to study this entire record.

THE COURT: Let me interrupt this. Gentlemen, I am going to check the record. I am going to put this off. I am supposed to put this off until tomorrow morning but if I find that the Defendants are right and that Arkansas did not refuse to accept this material, I am going to award attorneys fees to the defendant on this.

I am going to read the record.

That's another thing.

Gentlemen, the next thing I am going to take up is the discovery. But in the present state of this matter, it is obvious to the Court that the defendant is entitled to summary judgment on the quantity issue. I am not a bit sure on the best efforts issue; I am troubled by that. The defendant is going to get summary judgment with respect to the

nonconforming sources, those six or seven that were deficient, by 12,000 curies.

matter of the Discovery issues now?

MR. NICHOLSON: If we are going to come back tomorrow I see no reason.

THE COURT: I have another matter on tomorrow morning.

MR. SHARLITT: Your Honor, if Your Honor wants us back, of course--

THE COURT: I don't want you back at all, I want you to settle th is case. It seems to me that I learned a bad settlement is better than a good lawsuit and I am not sure this is a very good lawsuit. I am not sure. I just don't know but I will check the record and find out.

MR. SHARLITT: What we're asking for was a bit more time because I was unable to get a client of mine down here for this hearing. I asked and they could not come.

THE COURT: I am going home to Los Angeles tomorrow afternoon, and I have another matter on the clanedar that I must take on tomorrow morning; so I am going to make some time for this tomorrow morning, if necessary.

MR. NICHOLSON: At the rate it is raining there may be a legitimate fear of high water.

THE COURT: Let's talk about the discovery.

MR. NICHOLSON" Mr. Harvey is going to deal with those.

THE COURT: What are the costs.

MR. HARVEY: Approximately $15,000, Your Honor.

THE COURT: All right. Well, attorneys fees will be awarded in the amount of $25,000 and $15,000 in costs. This is on the basis of Mr. Hamley as an attorney that is entitled to charge the value of his service $160,000, and Mr. Galen 110, which would amount to more than the $25,000, but there is, has to be a certain amount of duplication, and I will make a deduction for the fact that there are two people involved instead of one, just like you two fellows involved here today. You are doubling up today, and I will not make the plaintiffs pay for that. The

attorneys fees will be $25,000 and the costs will be $15,000.

MR. SHARLITT: Your Honor, may I inquire?

THE COURT: Yes.

MR. SHARLITT: This is based on the seeking of the--

THE COURT: Preliminary injunction.

MR. SHARLITT: On the warranty.

THE COURT: On all of the bases they went through.

MR. SHARLITT: Okay.

THE COURT: With respect to the preliminary injunction.

MR. SHARLITT: All right.

THE COURT: All right. Gentlemen, the defendants will preare an appropriate order, and I think you better prepare findings on that, too. I

will submit them to counsel and get counsel's approval as to form. I will file them with the clerk, and they will send them to me in Los Angeles. All right, gentlemen. That will be the order.

MR. NICHOLSON: Thank you, Your Honor.

(Hearing adjourned.)

* * * * *